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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 50

CHARLES A. SHEPARD, PETITIONER,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT.

Petition for Certiorari Filed May 8, 1933. Certiorari Granted May 29, 1933.

SUPPLEMENT TO THE BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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ERRATA—ORIGINAL BRIEF.

Page	Line	
2	12	"attendent" should read "attended"
5	13	(R. 45-93) should read (R.45-49)
7	20	R. 511 should read R. 505
8	7	R. 391 should read R. 391-2
25	18	R. 626 should read R. 627
26	5	135 N. E. 667 should read 135 N. E. 647

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Counsel for the petitioner file this supplement to the brief in support of the petition for writ of certiorari with the hope that it will be of assistance to the Court in determining the issues involved. Reference will be made to the page of the original brief, and the point argued therein to which each item set out herein has reference.

This cause is here on a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit, petition for which was filed in this Court on May 8, 1933, and granted on May 29, 1933.

BRIEF PAGE 14, I:

The opinion of the Circuit Court of Appeals for the Tenth Circuit denying a rehearing, which was not yet

reported at the time of the filing of the petition for certiorari, is reported in *Shepard* v. *United States,* 64 Fed. (2d) 641.

BRIEF PAGE 16, POINT A, 1:

The Declarations Were Not Admissible for Truth of the Matter Asserted As Dying Declarations.

The following is directed to the support of Point A, 1 (a) found on pages 16 and 17 of the brief in support of the petition for certiorari and further in support of the opinion of the Circuit Court of Appeals holding the testimony of Sergeant Gresser and Clara Brown reporting hearsay statements of Mrs. Shepard inadmissible as dying declarations because there was lacking the requisite guaranty of trustworthiness in a belief of imminent and impending death on the part of the declarant (R. 598, 602).

The law requiring as a preliminary matter to the admission of a dying declaration as a hearsay exception, that the declarant be possessed of a *consciousness* or *belief of imminent* or speedy death, is well established in every state and Federal jurisdiction.

Mr. Justice Fuller, in *Mattox* v. *U. S.*, 146 U. S. 140, on writ of error from the District Court of the United States, for the District of Kansas, aptly puts it (l. c. 152):

> "The point is to ascertain the state of mind at the time the declarations were made. The admission of the testimony is justified upon the ground of necessity, and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood, and enforce

as strict adherence to the truth as the obligation of an oath could impose. But the evidence must be received with the utmost caution, and if the circumstances do not satisfactorily disclose that the awful and solemn situation in which he is placed as realized by the dying man, because of the hope of recovery, it ought to be rejected."

The testimony of Sergeant Gresser shows absolutely nothing from which it could be found Mrs. Shepard had such a belief of imminent and speedy death as to provide the foundation for the admission of her statement as a dying declaration. His testimony is as follows:

TESTIMONY OF SERGEANT GRESSER.

J. C. Gresser:

"I had a conversation with Mrs. Shepard about May 25th, about four or five days after she took sick, relative to her symptoms.

Q. Did she, at that time, detail any symptoms at all?

A. Yes, sir.

Q. What did she tell you?

Mr. Kagey: Just a moment; we again object; this woman had six doctors, she did not have to detail symptoms or hold conversations with anybody else about her illness, and not shown to have occurred in the presence of the defendant, and hearsay.

The Court: You may answer.

Mr. Kagey: We except.

A. Yes, sir; she told me she believed she was being poisoned, and asked me if I could run some whiskey for arsenic that she had.

Mr. Kagey: Wait a moment; we move to strike out the testimony of the witness as incompetent,

prejudicial, hearsay, not in the presence of the defendant, being matters of opinion, and not statements of fact, and not tending to prove or disprove any of the issues.

The Court: Overruled. Is that all?

Mr. Kagey: What is that?

The Court: No cross examination?

Mr. Kagey: We have moved to strike out. I moved to strike it out, did I not? I do not think I should cross examine after I move to strike it out.

The Court: Very well, you will be excused.

Mr. Kagey: I note an exception.

* * *

Q. Did she make any statement in reference to the amount you would have to have?

A. Yes, sir.

Q. What did she say?

Mr. Kagey: Wait a moment; amount of what? We object to this—

Mr. Brewster: You better go back.

The Court: Yes, you better come back to the stand.

Mr. Brewster: I will ask the question again:

Q. Did she make any additional statement in reference to this matter?

A. Yes, sir.

Q. What did she say?

Mr. Kagey: We object to this as hearsay, not occurring in the presence of the defendant.

The Court: She may answer.

Mr. Kagey: We except.

She wanted to know how much whiskey it would take to run for arsenical poison, or other kind of poison, and I told her it would take approximately three ounces.

Mr. Kagey: We object to that question also and move to strike it out, and also the answer, upon the same grounds. I did not have time to state it. We move to strike out the answer as hearsay, not occurring in the presence of the defendant.

The Court: It may stand.

Mr. Kagey: We except.

Mr. Brewster: Q. What did she say then?

Mr. Kagey: We object to this question for the reason that it would be hearsay, not occurring in the presence of the defendant, and incompetent under any theory.

The Court: He may answer.

Mr. Kagey: We except.

A. She said there was not enough whiskey to run for that—to let it go.

Mr. Kagey: Move to strike out the answer—

Mr. Brewster: That is all.

Mr. Kagey: —as hearsay, incompetent, and not made in the presence of the defendant.

The Court: Overruled.

Mr. Kagey: We except" (R. 540-542).

In spite of a total failure of any evidence to warrant even a suspicion that Mrs. Shepard at the time of the declaration to Sergeant Gresser expected death immediately, the trial court admitted the evidence unrestricted and unlimited to the consideration of the jury and over the objections of counsel for appellant at the trial.

It is also to be observed that Mrs. Shepard, the declarant, is reported by the witness to have said, "Yes, sir, she told me she believed she was being poisoned * * *." That is a statement of opinion and not one of fact, and, therefore, for this further reason, not ad-

missible as a dying declaration. *State* v. *O'Shea,* 60 Kan. 772, 57 Pac. 970; *Ehrhardt* v. *People,* 51 Colo. 205, 117 Pac. 164; *State* v. *Wilks,* 278 Mo. 481, 213 S. W. 118.

In addition, that the declaration may be admissible the declarant must have actually observed, or had opportunity for observation of the fact related. Wigmore, Evidence, 2nd Ed., Vol. III, Sec. 1445. In *State* v. *Wilks, supra,* a dying declaration was excluded because the declarant could not have made the statement from personal observation. Because it was impossible for the declarant to have seen who shot him, declarations were rejected in *Jones* v. *State,* 52 Ark. 347, 12 S. W. 704. Also, *Berry* v. *State,* 63 Ark. 382, 38 S. W. 1038, a declaration that whiskey the defendant gave him was poisoned was excluded. *Jones* v. *State,* 79 Miss. 309, 30 So. 759.

The testimony of Sergeant Gresser and likewise Nurse Brown, as shown hereafter, shows absolutely nothing from which it could be found that Mrs. Shepard actually observed, or even had the opportunity for observation of the fact related, and that the statement by Mrs. Shepard was pure conclusion, imagination or deduction from facts not detailed in the evidence.

Mrs. Shepard was taken ill on the evening of May 20, 1929. Nurse Brown arrived at the Shepard apartment and went on duty that night. She testified the declaration here complained of was made by Mrs. Shepard the next day and on the second day of her illness. Mrs. Shepard's death occurred on June 15, 1929 (R. 86), 24 or 25 days after the statement was alleged to have been made to Nurse Brown. The testimony of Nurse Brown is as follows:

TESTIMONY OF NURSE BROWN.

Nurse Clara Brown:

"I have testified before in this case. I had conversation with Mrs. Shepard the second day I was there and her mind was normal; she was rational.

Q. Did she at that time make any statement to you?

Mr. Kagey: Wait a moment; she answered before I could object. I want to object to the question, and move to strike out the answer for the reason that it calls for the opinion and conclusion of the witness, and no proper foundation laid for the hearing of the testimony by this witness.

Mr. Brewster: I will withdraw it then.

Mr. Kagey: And also that it is not rebuttal.

Mr. Brewster: Q. Did you talk with her?

A. Yes.

Q. Did she answer your questions intelligently?

A. She did.

Q. Did she make any statement to you in regard to what she thought about getting well?

A. Yes.

Mr. Kagey: Wait a moment—

Mr. Brewster: Q. What was it?

Mr. Kagey: We object to this as incompetent, irrelevant and immaterial, a conversation occurring in the absence of the defendant, and hearsay; not rebuttal.

The Court: She may answer.

Mr. Kagey: What was the ruling?

The Court: She may answer.

Mr. Kagey: Exception.

Mr. Brewster: What was it? What did she say? Read the question.

(Last question read as above recorded.)

A. She said she was not going to get well.
Q. Did she make any statement as to what was going to happen to her?
A. She was going to die.

Mr. Kagey: Wait a moment; we make the same objection to that question, and move to strike out the answer, for the reason that it is hearsay, not made in the presence of the defendant, incompetent, irrelevant and immaterial, and not rebuttal.

The Court: Overruled.

Mr. Kagey: Exception.

Mr. Brewster: Q. Did she, at that time, or at any time, or at any time after that, ever express in your presence any idea that she was going to get well?
A. No.
Q. Did she afterward, and at different times, make any statement to you as to whether she would, or would not get well?
A. Yes.
Q. What did she tell you?
A. She—

Mr. Kagey: We object to that, for the reason that it is hearsay, incompetent, irrelevant and immaterial, not shown to have been made in the presence of the defendant, not rebuttal.

The Court: She may answer.

Mr. Brewster: Q. At the time—

The Court: Just a moment; let her answer.

Mr. Brewster: Oh, pardon me. Read the question.

(Last question read as above recorded.)
A. She said she was going to die.
Q. At the time she told you, on the second day that you were there, that she was going to die, did

you, at that time and in that connection, have a conversation with her in reference to her condition?

A. Yes.

Q. What was it?

Mr. Kagey: We object to that as hearsay, not made in the presence of defendant, incompetent, irrelevant and immaterial.

The Court: You may answer.

Mr. Kagey: We except.

The Court: Read the question, Mr. Reporter.

(Last question read as above recorded:)

A. She asked me if I would do her a favor. I consented. Then she told me to go to Major Shepard's room and, in his closet, get a quart whiskey bottle off the shelf.

Mr. Kagey: What kind of a whiskey bottle?

The Witness: It was a quart.

Mr. Kagey: A quart?

The Witness: Yes. It was a dark green whiskey bottle, with a whiskey label, which she said was the one—

Mr. Brewster: Did you make more than one trip before you brought the bottle?

A. I did.

Q. Go ahead and state what she said to you.

A. She asked me to smell the contents. I did so. She then asked me if it smelled peculiar. I told her I did not know. She asked how much was in the bottle. I noticed there was not more than a tablespoonful; there was not more than a tablespoonful; and told her.

Q. Speak a little louder.

A. She said she knew there could not be but a small amount, because the last time she had taken a drink out of that bottle, she made a remark to Major Shepard, that there was not only enough for

about one more drink, and she was going to save that until she needed it. She asked if that was enough to test for poison. I told her I did not know.

Q. What did she say with reference to that liquor, when she and the Major had it, whether it was good or bad whiskey?

A. It was good.

Mr. Kagey: Just a moment. We move to strike out the answer, and object to the question, for the reason that it is incompetent, irrelevant and immaterial, hearsay called for from this witness, and is not rebuttal.

The Court: Please read the question, Mr. Reporter.

(Last question read as above recorded.)

The Court: You may answer.

Mr. Kagey: Except.

A. It was good.

Mr. Brewster: Now, go ahead and state what, if anything, she said as to how she took sick, and what she did.

Mr. Kagey: We object to this as incompetent, irrelevant and immaterial, hearsay, not rebuttal testimony, incompetent, irrelevant and immaterial.

The Court: She may answer.

Mr. Kagey: Except.

A. She stated that this was the bottle from which she drank just before collapsing on the evening of May 20.

Mr. Brewster: Q. What did she say as to the taste of it the night she took sick, the 20th?

Mr. Kagey: Object to this as leading.

Mr. Brewster: What, if anything?

Mr. Kagey: Objected to for the further reason that it is hearsay, not rebuttal, a conversation not shown to have been made in the presence of the defendant.

The Court: You may answer.
Mr. Kagey: Except.
A. It was altogether different.
Mr. Brewster: What did she say? Give her words.
A. It was not good.
Q. Did she say anything about how it tasted?
Mr. Kagey: Same objection.
The Court: You may answer.
Mr. Kagey: Except.
A. She said that she was being poisoned.
Mr. Brewster: What did she say? Give her words.
Mr. Kagey: All right; we object to this, also, as incompetent, irrelevant and immaterial, hearsay, not made in the presence of the defendant, not rebuttal.
The Court: You may answer.
Mr. Kagey: Except.
A. She said: 'Dr. Shepard has poisoned me'" (R. 562-565).

The above testimony of Nurse Brown does not reveal a belief on the part of Mrs. Shepard of a "certain expectation of almost immediate death." That she believed she would not recover, or did not want to recover, is not sufficient. Her state of mind at the time of the statement must evidence her belief that death was impending and sure to speedily follow.

Neither does the record reveal, from the testimony of other witnesses, that Mrs. Shepard had such a belief at the time the declaration was made as to provide the requisite guaranty of trustworthiness. Numerous witnesses testified that Mrs. Shepard made statements that she was going to die and wanted to die long before she

was even taken ill and before the declaration reported by Nurse Brown was made.

Ruth Winchester testified that some time in October, 1928, approximately eight months before Mrs. Shepard made the declaration in question, she, Mrs. Shepard, expected to die and did not want to live and expected soon to go back to California, in a box (R. 482, 483).

Robert Crawford related a conversation which took place two weeks before Mrs. Shepard became ill to practically the same effect (R. 489).

Mrs. Veda Snyder testified to statements of Mrs. Shepard made several days before her illness that she expected to die (R. 497). However, such evidence, gathered from statements made from almost a year to several days before even her illness, can have no relevancy to show Mrs. Shepard's belief of death at the time of the declaration which occurred after her illness, but they do reveal a continued morbid state of mind which cast grave doubts upon her actual belief of impending death at the time of her statement to Nurse Brown, as it appears to have been common for Mrs. Shepard to say that she wanted to and expected to die long before her illness. It is not proper foundation for a dying declaration that the declarant expresses an intention or desire to die or belief that they will die some time.

J. C. Dye, who saw Mrs. Shepard on the same morning in which she made the declaration to Nurse Brown, testified that Mrs. Shepard was more annoyed than depressed (R. 360).

Helen Holycross testified that the morning after Mrs. Shepard was taken sick, "I was in her room and

Major Shepard came in, and told her to take care of herself, and hurry up and get well, and he would send her to California for a complete rest, and she said, yes, she would in a box" (R. 486). Mrs. Shepard was only here repeating a statement which she had previously made to Ruth Winchester, even before her illness, that she would return to California in a box (R. 482). The simple statement testified to by Helen Holycross does not in any way indicate the belief of the approach of a speedy death.

Several witnesses testified to statements made subsequent to the declaration of Nurse Brown. When Major DuFrenne, a Government witness, visited Mrs. Shepard in the second week of her illness, "she appeared glad to see me and she said 'You will get me well, won't you?'" (R. 94).

Walter Rose testified that on several occasions fourteen or fifteen days prior to her death, or about twelve days after the statement to Nurse Brown, Mrs. Shepard said, in effect, that she did not want to get well, that she wanted to die (R. 372).

Robert Crawford testified that in a conversation with Mrs. Shepard several days after she became ill, she said she did not want to get better (R. 489).

Elizabeth Strickler testified that a week after Mrs. Shepard's first illness, she seemed in a very happy frame of mind and said she was much better (R. 493).

Further description of the condition of Mrs. Shepard and her state of mind may be gathered from pages 14 to 19 of this supplement.

Examination thus made of the record leaves the inescapable conclusion that the requisite foundation for the admission of Mrs. Shepard's opinion as to the cause of her death is lacking, and the statements reported by Nurse Brown and Sergeant Gresser were not admissible as dying declarations for truth of the matter asserted and that the Circuit Court of Appeals was correct in its rule that the testimony was improper as a dying declaration.

BRIEF PAGE 23, POINT A, 2:

The Declarations of Mrs. Shepard Were Not Surrounded by Guaranties of Trustworthiness and Were Not Made at a Time and Under Such Circumstances As to Be Free from Suspicion of Misrepresentation.

Were the declarations of Mrs. Shepard made at a time and under such circumstances as to be surrounded by guaranties of trustworthiness and free from suspicion of misrepresentation? The Circuit Court is not silent. In holding that the declarations were not admissible as dying declarations, it has answered a positive "No."

Major Hawley, a witness for the Government, testified that when he first saw Mrs. Shepard during her illness on May 21 (the *very day of the declaration* testified to by Nurse Brown):

> "Mrs. Shepard was in bed, weak, ill, gave a history as having vomited a great deal the evening before and throughout the night, was still nauseated, the pupils dilated, weak, had a slight mental confusion which could be penetrated, that is, she would answer intelligently if you repeated your questions

and was in a general condition which might be a mild collapse or recovery from collapse. She apparently got better (R. 63). * * * When I came to see her the morning after I think Major Shepard told me about her mental condition the night before. When I called to see her she had slight confusion and loss of memory. She did not show any particular cerebral excitability like 'picking things out of the air.' Major Strickler may have told me of her symptoms although I have no recollection. Symptoms like she had I think could be caused by alcohol" (R. 88-89).

Major Strickler, a witness for defendant, testified that he was called the first night of Mrs. Shepard's illness (R. 354) and attended her daily during four or five days (R. 355). He described her at his first call (and that before declaration to Nurse Brown) as follows:

"Mrs. Shepard was lying in bed, fully clothed, and was apparently hearing voices. She continually reached out, as if picking objects out of the air, brushing them off of her bed, and she was blind to the extent that she could not recognize fingers held in such a manner (indicating) before her eyes, and she complained of some numbness in her lower extremities. The pupils of her eyes were widely dilated, there was no reaction to light, and her knee-jerks were absent, and could not be obtained. * * * The odor of alcohol was very strong on her breath" (R. 354).

Diagnosed the condition as polyneurotic alcoholic psychosis; that is,

"simply a disorder of the mind characterized by these hallucinations, and the idea that she had been

doing certain things which she had not done, and this mental picture was associated with the neuritis, which included the impairment of her vision, amounting to practical blindness, the loss of knee-jerks and her complaint of numbness in the extremities" (R. 354-5).

At the end of the first week of her illness Major Strickler described her condition as:

"Impairment of vision had improved and it was possible to break through her confusion and get some relevant and coherent answers from her (R. 356). * * * The plain fact that Mrs. Shepard had been confined to her bed for a number of days, she would tell me how she had gone down to Junction City that morning, or sometime during the day, and the various shops she had visited, the various ladies of the post she had conversed with, and how they would come home, and how they had lunched together, and played bridge in the afternoon, and where they had spent the afternoon, all of which was utterly impossible" (R. 356).

Nurse Brown, witness for the Government, testified:

"When I arrived, Mrs. Shepard's condition was, she was in bed, very ill, and delirious and had been vomiting. The next day she seemed better. For a few days she got better. With reference to her mental condition, she gradually cleared up. It was just a few days before it apparently cleared up. Her eyes were dilated (R. 137). * * * Mrs. Shepard was very ill and delirious. She talked in her delirium and I think she picked things out of the air, and her vision was blurred. She complained of disturbance of her vision" (R. 139).

Mrs. Gates, a witness for the Government, testified that when she arrived the evening on which Mrs. Shepard was taken ill, Mrs. Shepard's condition was as follows:

> "She was in bed with her clothes on. She was delirious. The pupils of her eyes were very large. She did not recognize me at that time. She did not recognize me at all that evening" (R. 56).

Major Dye, one of the attending doctors and a witness on behalf of the defendant, testified that on the morning of the declaration made to Nurse Brown, Mrs. Shepard's condition was as follows:

> "I noticed her vision. She could see things very dimly, she knew color in front of her vision, she could see, but she could not count fingers. Her vision was blurred. I thought her eye condition at that time was due to salicylic acid. I think possibly it could have been due to the use of bad liquor, bootleg liquor. I have never seen in mercuric poisoning, the conditions of the disc and retina as I have described it" (R. 360).

The foregoing testimony of both the Government and the defendant, as to Mrs. Shepard's condition, at about the time of the making of the declarations, draw a picture of a woman utterly incompetent to make, with clearness and accuracy and free from suspicion, a statement that would bare her true state of mind. The only state of mind it reveals, under these facts, is a condition of confusion that could not be relied upon. It is a picture of a mind tormented with insanity and irresponsibility. To those conditions of serious physical illness and mental unbalance must be con-

sidered the human unwillingness to publicly admit suicidal intent while still alive, and the natural willingness to wildly blame, in times of stress, someone often closest, as intimate friends or spouse, for results visited upon one through self faults. It only adds to the suspicious circumstances and chances of misrepresentation that played so vividly around the declarations of Mrs. Shepard.

Another circumstance should be noted by the Court which points suspiciously toward the unreliability of this evidence. It goes to both the circumstance surrounding the making of the declaration by Mrs. Shepard and to the reliability of the reporting by Nurse Brown. Nurse Brown, in answer to questions whether she had reported the statements of Mrs. Shepard before the trial, said:

> "I did not tell anyone about it. The first time I told anyone about it was after her death * * *. There were six or seven doctors on the case while I was there * * *.
>
> Q. Do you mean to say that you were on that case for twenty-five days, after you had been told by Mrs. Shepard that she was poisoned, and her husband had poisoned her, and poisoned her with this specific liquor, and never said a word to a soul about it?
>
> A. Yes, because she took me into her confidence" (R. 566).
>
> "Q. Do you think that excused you? That is your excuse?
>
> A. Yes, because I promised her I would not tell.
>
> Q. You promised her you would not tell?
>
> A. Yes.
>
> Q. You thought she knew what she was doing when she told you that?

A. Yes, I think she was.
Q. You never told a soul about it?
A. No.
Q. When did you first tell any of the Government detectives here?
A. Not until they came to see me.
Q. Not until they came to see you? When was that?
A. That was, I think, in December, I am not sure, but I think it was in December" (R. 567).

A registered nurse attending a case the exact nature of which was baffling to three or four doctors had failed to report a statement by the person ill that she was poisoned, which would have provided the clue for proper medical treatment, all because the sick woman had revealed it in confidence and upon promise not to tell. It is impossible to escape the conclusion that Nurse Brown either considered it an irresponsible statement and sick room chatter, made by a person delirious and in such circumstances of suspicion as to be unworthy of consideration and reporting, or that it was an after-thought on the part of Nurse Brown.

If it was the former, the evidence was incompetent under the Hillmon, Hayward and Trefethen cases (Br. 22-23). If it was the latter, possibly "the wish was father to the thought."

Brief Page 23, Point A, 2:

In *State* v. *Wilks*, 278 Mo. 481, 213 S. W. 118, the Court said:

"The questions arising on the admissibility of dying declarations have often received the consider-

ation of this court. It is a universal rule that a trial court must determine, in the absence of the jury, the preliminary question of whether or not the declaration offered is admissible."

Wigmore on Evidence, 2nd Ed., states the rule thus:

> "The admissibility of a given piece of evidence is for the judge to determine. This general principle is not disputed; its application to the various kinds of evidence—qualifications of witnesses, absence of a hearsay deponent, voluntariness of a confession, condition of a dying declarant, and so on—has already been considered under the various heads of evidence. It follows that, so far as the admissibility in law depends on some incidental question of fact—the absence of a deponent from the jurisdiction, the use of threats to obtain a confession, the sanity of a witness, and the like—this also is for the judge to determine, before he admits the evidence to the jury" (Sec. 2550).

And speaking specifically of dying declarations, Wigmore states the rule in Sec. 1451, as follows:

> "That the judge is to pass on the preliminary conditions necessary to the admissibility of evidence is unquestioned (*post* 2250). It follows, as of course, that, since a consciousness of impending death is according to the foregoing principles legally essential to admissibility, the *judge must determine* whether that condition exists before the declaration is admitted."

To the same effect see *Commonwealth* v. *Brown*, 164 Mass. 577, 582; *State* v. *Kunkel* (Mo.), 209 S. W. 865, 868.

BRIEF PAGE 26, POINT B:

The duty of the Court to restrict the application of testimony has been stated specifically in the following authorities:

In *State* v. *Lavin,* 80 Ia. 555, 46 N. W. 553; where the complainant was offering rebuttal evidence in a bastardy case regarding the paternity of the child, the defendant having testified as to certain admissions which were made during an effort to effect a settlement of the controversy, it was held that the Court has a positive duty to properly instruct the jury on the law affecting the offer to compromise.

In *State* v. *Collins,* 127 N. C. 667, 28 S. E. 520, when declarations of one or two defendants jointly on trial were admissible only against the one who made it, it was held error for the Court to fail to charge to that effect.

In *Thornley* v. *State,* 36 Tex. Crim. 118, 35 S. W. 981, where the Court had theretofore refused to hold it error, upon a rehearing it held it was fundamental error for the Court to fail to instruct the jury as to the purpose for which they should consider the testimony before them with reference to the passing by the accused of a forged instrument other than that for which he was being tried.

In *Barnett* v. *State,* 104 Ohio St. 298, 135 N. E. 667, speaking with reference to like actions which tended to prove moral perversions, the trial Court at the time of introduction of such evidence, or in its general charge, should limit the application of such evidence by the jury to such purpose.

In *Lanham* v. *State* (Texas Court of Criminal Appeals), 269 S. W. 799, the Court said:

"Generally where there is danger that testimony of another transaction in evidence than one relied on might cause conviction or might be given unwarranted weight by the jury as tending to prove main transactions, failure to limit testimony as to other transactions to purposes for which it is admitted is error" (Syl. 2).

And in *Elam* v. *State*, 16 Tex. Appeal Reports, 34, the Court stated the rule by which it was to be governed in determining whether error would warrant the reversal of judgment as follows:

"If there be a material misdirection of the law as applicable to the case, or a failure to give in charge to the jury the law which was required by evidence in the case, and the affirmative error, or the omission, is calculated, under all the circumstances of the case; to injure the rights of the defendant, this court should, for either of these errors, reverse the judgment."

BRIEF PAGE 42, POINT D:

Authorities Supporting Specification of Error D (Br. pp. 39, 43) In Support of Principles Stated That Accused Is Not Only Entitled to a Fair and Impartial Jury, But a Jury Selected by Methods Established by Law and from a Panel Not Limited by Disqualifications Not Based Upon a Determination of the Fact.

In *State* v. *Willie*, 130 La. 454, 58 So. 147, the Court stated:

"This rule necessarily implies that a competent juror duly accepted and sworn cannot be discharged without legal cause. If the reason for the exclusion of such a juror be insufficient, the judgment will be reversed."

In *Welch* v. *Tribune Publishing Company*, 83 Mich. 661, 47 N. W. 562, the Court, at page 563, says:

"We do not think the judge has a right to reject a disqualified juror with whom the parties are satisfied, unless for sufficient cause; and such cause should appear upon the record. *Pearse* v. *Rogers*, 2 Fost. & F. 137. *The circuit judge is not invested with any right of peremptory challenge.* He can excuse for cause, but the cause must be stated, so that it may appear of record. Proff. Jury, Section 140. The exercise of the power to discharge a juror by the circuit judge of his own volition is not a matter of discretion. It must be based upon some cause. It will not do to hold that a circuit judge may, without assigning any reason, discharge jurors at his mere will or caprice. If he may so discharge one juror he may discharge a dozen, and compel parties, after they have exhausted their peremptory challenges, to accept such a jury as he is satisfied with. Counsel for defendant contends that the record does not show that plaintiff was prejudiced, and that the presumption is in favor of judicial action. The record does disclose that the juror was one of the regular panel, and it further discloses that talesmen were resorted to in order to fill the panel which tried the cause. The law has provided measures for the selection and return of jurors to serve in the trial of causes, and a party has a right, if there be no legal objection to the jurors so returned, to have his cause tried by jurors so selected, unless rejected in the manner provided by law."

In *State* v. *Diedtman*, 58 Mont. 13, 190 Pac. 117 (1920) Syllabi 2, 3 and 4 are as follows:

"In a criminal prosecution, where the trial court, on examination of a venireman, interposed with the remark that, if the county attorney would

challenge, he would sustain the challenge, and it did not appear that there was any ground for sustaining a challenge for cause, such action of the court was erroneous, amounting to the exercise of peremptory challenge, which right the trial court does not possess, particularly as the right to challenge can be waived by failure to exercise (Syl. Para. 2).

"A defendant is not only entitled to a fair and impartial jury, but he is entitled to insist that the jury shall be selected according to the methods established by law (Syl. Para. 3).

"In a prosecution for sedition, the action of the trial court in announcing on *voir dire* examination that he would sustain a challenge to a veniremen, amounting to the exercise by the court a peremptory challenge, HELD most prejudicial, because indicating to the remaining jurors that the court entertained prejudice against any of the veniremen who manifested a friendly disposition toward the defendant" (Syl. Para. 4).

In *Aaronson* v. *State*, 56 N. J. L. 9, 27 Atl. 937, a juror was excused by the Court for cause and the Supreme Court in its opinion said:

"Nor do we think there is any substance in the suggestion that the power thus conceded will be liable to be abused, for it is certain that the court cannot arbitrarily, and of its own motion, excuse any of these jurors from serving in the given case, for, if no ground for the dispensation existed, the judicial action would be erroneous, and could be reviewed by means of a writ of error."

In *Hildreth* v. *City of Troy*, 101 N. Y. 234, 4 N. E. 559 (1886), the Court at page 561 made the following statement:

"It is said that no injury resulted to the defendant from the erroneous exclusion of the city

jurors, and a competent jury actually tried the case. The court cannot say that the trial would have resulted differently if the city jurors had not been excluded. On the other hand, the contrary cannot be affirmed. It is certain that except for the erroneous ruling the jury would have been differently constituted. Jurors differ in intelligence, judgment and fitness to act as jurors. It is, we think, the legal right of a party to have the chance that the best man may be drawn, and that the range of selection shall not be limited by excluding without cause competent jurors from the panel. It cannot be doubted that if an incompetent juror had been admitted, against the objection of the defendant, the judgment would be set aside, and yet in many cases it would be impossible to show any actual injury. A person not a resident of the county, or over 60 years of age, or without the requisite property qualification, is not a competent juror (Code Section 1027); but it would, we conceive, be no answer to an exception taken to his admission that no actual injury was shown to have resulted. The violation of the legal right of the party to have the case tried by competent jurors would be conclusive."

CONCLUSION.

For the reasons advanced in the petition for a writ of certiorari and brief in support thereof, together with supplement, it is urged that the judgment of conviction of the court below should be reversed.

Respectfully submitted,

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